Supreme Court, U.S
FILED
MAY 20 1993
OFFICE OF THE CLERK

No. 92-6281

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

RESPONDENT STATE OF UTAH'S RESPONSE TO THE MOTION OF THE UTE INDIAN TRIBE TO INTERVENE

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PREFACE

Movant Ute Indian Tribe has, by consent of the parties, participated in this matter as amicus curiae and opposed certiorari. It now seeks to intervene as a party, aligned with Petitioner Robert P. Hagen. In seeking to justify intervention, the Tribe's motion raises substantive and procedural concerns which will be discussed briefly in Point I below. Moreover, the Tribe's motion also appears to address issues better left to the briefs on the merits, and makes certain inaccurate statements which require brief response or clarification. These will be discussed in Point II.

POINT I: Response to the Ute Indian Tribe's Motion to Intervene

The issue in this case is whether the Uintah Valley portion of the Uintah & Ouray Reservation was diminished by a series of congressional acts which culminated in the opening of the reservation to non-Indian settlement in 1905. The dispute involves nearly one million acres of non-Indian land lying within the original exterior boundaries.

The ultimate resolution of the boundary question by this Court is of vital importance to the State of Utah and the affected local governmental entities. This is why Utah supported the granting of certiorari in this case--as did the United States. On the other hand, we can appreciate why the Ute Tribe is also concerned, since the resolution of the boundary dispute will obviously affect the area within which the Tribe may exert its own jurisdiction. Given the interests of the Tribe and the importance of this matter to the Tribe and its members, their rather unusual request to intervene at this late stage of the proceedings is understandable.

However, the Tribe's motion to intervene raises some concerns and observations which we feel should be considered by this Court:

A. Ordinarily, intervention before this Court is rarely granted, although we acknowledge that in certain exceptional circumstances it has been allowed. Arizona v. California, 460 U.S. 605 (1983) (Indian tribes allowed to intervene in an original action involving water rights); Banks v. Chicago Grain Trimmers, 390 U.S. 459 (1968);

Rogers v. Paul, 382 U.S. 198, 199 (1965); Labor Board v. Acme Industrial Co., 384 U.S. 925 (1966), 385 U.S. 432 (1967); and Texas v. Louisiana, 414 U.S. 1107 (1973). The Tribe has already received consent of the parties to participate as amicus curiae, and the United States will undoubtedly file a brief in support of Petitioner Hagen and the Tribe. Even though the Tribe has legitimate interests in the outcome of this matter, we are not certain those interests justify intervention. Further--as a practical matter--it is not clear to us that the Tribe would gain any particular advantage through intervention over the status it already has as amicus.[1]

We are not aware of any reservation diminishment case before this Court where an Indian tribe has asked or been allowed to intervene. In both Seymour v. Superintendent, 368 U.S. 351 (1962), and Mattz v. Arnett, 412 U.S. 481 (1973), the local tribe involved (Colville and Klamath River, respectively) did not participate in the case, either as a party or as amicus curiae. Seymour, 368 U.S. 351-52; Mattz, 412 U.S. 482-83.

In DeCoteau v. District County Court, 420 U.S. 425 (1975), the Sisseton-Wahpeton Sioux Tribe filed an amicus brief with the Court. DeCoteau, 420 U.S. at 426. In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Tribe initiated the action below and was already a party when the case reached this Court. In Solem v. Bartlett, 465 U.S. 463 (1984), the Cheyenne River Sioux Tribe participated as amicus. Solem, 465 U.S. at 464. In all of

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[1] The only real advantages we can see to intervention are that as intervenor the Tribe may have a right to file a reply brief and may be in a somewhat stronger position to request oral argument.

the above cases, the United States participated as amicus curiae and, in doing so, aggressively protected tribal interests.

B. The rare instances where this Court has allowed intervention have, to the best of our knowledge, all involved civil actions. This case, however, arises in the context of a criminal proceeding. We have a difficult time perceiving how a person or entity not charged with a crime can intervene in a criminal case, and authorities seem to agree. Gannet Pacific Corporation v. Richardson, 580 P.2d 49, 57-58 (Hawaii 1978); State v. Bianchi, 593 P.2d 1330, 1331 (Wash. 1979); Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. United States District Court for the District of South Carolina, 551 F.2d 559, 563 (4th Cir. 1977); and People v. Ham, 734 P.2d 623, 625-26 (Colo. 1987).[2]

The answer to this problem may lie in the fact that the issues in the present proceeding do not involve the guilt or innocence of Petitioner Hagen. Rather, the issue is whether the state court had jurisdiction over the offense in the first place.

C. By the tenor of its motion (Tribe's Motion, pp. 5-7), one may get the impression the Ute Tribe is the party in interest rather than a party in interest. While we

[2] It should be noted that under unique circumstances parties have been allowed to intervene in criminal proceedings in lower state and federal courts. These cases primarily involve challenges to so-called "gag"orders. News American Division, the Hearst Corporation v. State, 447 A.2d 1264 (Ct. App. Md. 1982); News-Press Publishing Co. v. State, 345 So.2d 865 (Ct. App. Fla. 1977); and United States v. Cianfrani, 573 F.2d 835 (3rd Cir. 1978).

cannot speak for Petitioner Hagen, we feel it is important to consider any potential effect the Tribe's intervention may have on him. This is Petitioner Hagen's case, and he is the one facing up to five years in prison.

D. The Tribe's motion advances several arguments as to the importance of allowing it to intervene. Some of these arguments indicate a continuing effort by the Tribe to raise and interject issues which are not presently before this Court. All of the parties urging this Court to grant certiorari did so out of a belief that the conflicting decisions on the reservation boundaries between the state and federal courts needed to be resolved. That is the issue on which this Court granted the petition.

If the Tribe is allowed to intervene, it should not be allowed to broaden the issues beyond those currently framed. Rule 14.1(a); and Irvine v. California, 347 U.S. 128, 129 (1954).

Despite the above observations, our primary concern is that the Court be fully advised in this matter on the issues presented for review. If intervention by the Tribe would materially help to accomplish that end, we do not oppose the Tribe's motion.

POINT II: Response to Specific Representations Made by the Ute Indian Tribe

Perhaps in its efforts to demonstrate a compelling need for intervention, the Tribe makes certain factual statements which are inaccurate and strays into arguments which should more properly be addressed on the merits.

This is especially true with regard to the equities of the case. We therefore feel compelled to briefly respond to several items raised by the Tribe in its motion.

A. The Tribe correctly notes that the original Uintah & Ouray Reservation consisted of two separate but contiguous tracts, namely the Uintah Valley Reservation and the Uncompahgre Reservation. The Tribe further notes that only the boundaries of the Uintah Valley Reservation are directly at issue here (Tribe's Motion, p. 1, n.1). The total original area of both reservations is just over four million acres. At the same time, the Tribe states that three million acres are at stake in the present case (Tribe's Motion, pp. 5 and 7), and that an affirmance of the Utah Supreme Court's decision "would reduce the Reservation by almost three million acres" (Id., p. 7). Neither statement is accurate.

As stated above, the only reservation directly at issue here is the Uintah Valley Reservation which originally comprised approximately 2,039,040acres (Resp. App., p. 120a, Seth, J., dissenting). There is no dispute that the tribally-owned "trust lands"--amounting to approximately 1.2 million acres--are still "Indian country." Thus, the area here in dispute is just under one million acres of non-Indian land lying within the original Uintah Valley Reservation's boundaries. While this disputed area is obviously large, it is nowhere near the three million acres alleged by the Tribe. We suspect that the Tribe calculated its three-million-acre figure by including the original Uncompahgre Reservation--which is not directly here in dispute.

B. The Tribe alleges, inter alia, that the State of Utah initiated the Hagen/Perank prosecutions two years after the en banc decision of the Tenth Circuit Court (Tribe's Motion, p. 4). This is not an accurate portrayal of what happened. The primary decision by the Utah Supreme Court relating to the reservation boundaries is State v. Perank (Resp. App., p. 4a). The Perank case was under advisement at the time Petitioner Hagen's case reached the Utah Supreme Court. Both decisions were issued the same day, with Perank being the controlling opinion. The criminal charges against Perank were initiated in 1983--well before the Tenth Circuit Court's en banc ruling. In fact, the controlling law at the time Perank was charged was the Tenth Circuit Court's three-judge panel decision which held that the reservation had been diminished.

C. The Tribe implies that it was not allowed to fully participate in the proceedings before the Utah Supreme Court (Tribe's Motion, pp. 6-7). Again, that is not accurate. During the briefing on the Perank case, the State of Utah filed a formal motion with the Utah Supreme Court advising the court that the Ute Tribe had a strong interest in the boundary issue and suggesting that the court may want to invite the Tribe to file an amicus curiae brief. Shortly thereafter, the court invited the Tribe to file a brief.[3]

In response to the invitation by the Utah Supreme Court, the Tribe filed a short amicus curiae brief, but chose not to address the boundary issue. Thus, the Tribe

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[3] A similar invitation was also extended to the United States after the case was submitted.

did, indeed, have ample opportunity to address the boundary issue below, but elected not to.

D. The Tribe suggests that a ruling adverse to it would have negative ramifications for the Tribe and its members (Tribe's Motion, pp. 7-9). We agree that a ruling in this case adverse to the Tribe would carry with it jurisdictional ramifications for the Tribe and its 3,000 members. But that argument goes both ways. A ruling favorable to the Tribe would subject approximately 17,000 non-Indian people residing in the disputed area (and nearly one million acres of non-Indian land) to various forms of tribal jurisdiction by a government in which they have no vote and very little--if any--voice. Further, a ruling favorable to the Tribe would impair the State of Utah's sovereignty and jurisdiction within the disputed area. This is why a resolution of this question is so important.

E. The Tribe argues that an affirmance of the Utah Supreme Court's decision would result in a so-called "checkerboard" area where jurisdiction would be difficult to determine. This issue is clearly one to be argued on the merits. Suffice it to say here that we disagree that any substantial "checkerboarding" would result or that it would present a legal or practical problem in any event.

CONCLUSION

Subject to the concerns set forth in Point I above, we have no particular objection to the Ute Indian Tribe being allowed to intervene.

Respectfully submitted this 18th day of May, 1993.

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